Michigan Eye Bank *and* The Michigan Eye Bank Technicians Coalition, Petitioner. Case 7-RC-16620

December 16, 1982

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND JENKINS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Dwight R. Kirksey. Subsequently, pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director for Region 7 transferred this proceeding to the Board for decision. Thereafter, the Employer and the Interested Party, Wayne State University, filed briefs with the Board which have been duly considered.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board finds:

1. The Employer is a Michigan, nonprofit, human-service corporation primarily engaged in the business of securing, evaluating, and distributing human corneal tissue for the purpose of transplantation. It maintains its headquarters at the University of Michigan at Ann Arbor, and a second facility, the one with which the instant petition is concerned, at the Wayne State University in Detroit, Michigan.

Pursuant to agreements with the respective universities,[1] medical supervision for the Employer's enterprise is provided by two ophthalmologists, one from the faculty of the University of Michigan and one from the faculty of Wayne State University. Similarly, administrative supervision is provided by one individual from each university. The Employer's clerical work at the Wayne State University location is performed by university employees, members of a universitywide bargaining unit of clerical workers. The responsibility for actually securing, evaluating, and distributing corneal tissue is that of the technicians and research assistants, whom the Petitioner seeks to represent.[2]

The record shows that the Employer has an annual gross revenue in excess of $350,000, of which an amount in excess of $125,000 is derived from services to concerns located outside the State of Michigan. Accordingly, we find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

2. The parties have stipulated, and we find, that The Michigan Eye Bank Technicians Coalition is a labor organization within the meaning of Section 2(5) of the Act.[4]

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of employees of the Employ-

[1] The Employer annually pays agreed-upon sums into special university accounts, which the schools then segregate to pay for managing and maintaining the Michigan Eye Bank Program.

[2] Wayne State University contends that the Board lacks jurisdiction insofar as the research assistants who work on the Michigan Eye Bank Program are concerned because the University is an exempt employer under Sec. 2(2) of the Act, and the research assistants are its employees or it is at least a joint-employer with the Michigan Eye Bank over these employees. At the hearing, the Petitioner took the position that a joint employer relationship "may" exist with respect to the research assistants.

Approximately 260 employees designated as research assistants are employed throughout Wayne State University performing or assisting research. Most of them work full time on specific grant or contract projects such as the Michigan Eye Bank Program, as opposed to working on general fund projects of the University. The record shows, however, that their wages, hours, and working conditions are controlled, in large measure, by the University's board of governors. Thus, the University has established a standard hiring procedure, which each unit operating within the University must follow. The board of governors is also responsible for fixing the range within which all research assistants must be compensated. No exceptions are permitted *unless* the board of governors takes special action to create a variance. In addition, the board of governors provides for fixed-sum periodic wage increases with which each unit of the University in which research assistants are employed must comply. Finally, fringe benefits for research assistants are uniform throughout the University, regardless of where in the University the individual is working.

From the foregoing and the record as a whole, we are persuaded that the extent of the control Wayne State University exercises over important labor relations matters affecting the employment of the research assistants, whom the Petitioner seeks to represent, is such that it would be virtually impossible for the parties to engage in meaningful collective bargaining without directly and substantially involving the University, an undisputedly exempt governmental institution. Therefore, insofar as it calls for representation of research assistants, we shall dismiss the petition. *Slater Corporation*, 197 NLRB 1282 (1972).

[3] Our dissenting colleague would decline jurisdiction in this case based on *Ming Quong Children's Center*, 210 NLRB 899 (1974), in which the Board articulated a rule broadly exempting nonprofit eleemosynary employers from its jurisdiction. In *The Rhode Island Catholic Orphan Asylum, a/k/a St. Aloysius Home*, 224 NLRB 1344 (1976), however, the Board reconsidered the *Ming Quong* rule and found that it was no longer viable. Thus, the Board stated that henceforth "the only basis for declining jurisdiction over a charitable organization is a finding that its activities do not have a sufficient impact on interstate commerce to warrant the exercise of the Board's jurisdiction." 224 NLRB at 1345. We believe that *St. Aloysius* was correctly decided, and shall continue to adhere to the sound rule set forth therein.

[4] The Employer argues in its brief, despite its stipulation at the hearing, that The Michigan Eye Bank Technicians Coalition is not a labor organization because the technicians the Petitioner seeks to represent are independent contractors rather than employees. As we conclude, for the reasons set forth *infra*, that the technicians are employees, we find no merit in the Employer's contention.

er within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

5. The Petitioner seeks to represent a unit consisting of all research assistants and technicians at the Employer's Wayne State University location, but has indicated its willingness to represent a unit limited to technicians alone. The Employer contends that a unit including technicians is inappropriate, because the technicians are independent contractors. Wayne State University avers that the technicians, if found to be employees, are employed solely by the Michigan Eye Bank, and that no joint-employer relationship exists with the Eye Bank with respect to them.

The Employer acts as the designee of the medical examiners in both Wayne County and Oakland County, Michigan, for the limited purpose of excising the corneal tissue from those cases which the medical examiners deem appropriate. The excisions are performed at the county morgues by technicians or, as the Employer refers to them, "Consultants."[5] All of the necessary equipment and supplies for the excision procedure are provided by the Employer.

The technicians work out a schedule among themselves, subject to the Employer's approval, to cover the respective morgues between the hours of approximately 7 a.m. and 1 a.m. According to the Employer, the technicians are not required either to report to or to remain at the Eye Bank's facilities during their hours of availability. This assertion is partially contradicted, however, by Shelly Temperly, a technician who testified that the Employer does require the technicians to be at the office whenever they cover the Wayne County morgue. If there is an excision to be done, the technician drives to the morgue and performs the procedure, returns the tissue to the Eye Bank, fills out the necessary reports, and turns in the surgical instruments for sterilization. In addition to compensating the technicians for corneal excisions, the Employer pays them for attending a weekly meeting to discuss the previous week's work.

Richard L. Fuller, the managing director of the Eye Bank, testified that individuals cannot begin working for the Employer as technicians until they are first screened for the appropriate qualifications, and then trained to do the job. The training period lasts anywhere from 4 to 8 weeks, after which the Employer offers a "consulting agreement" to those who have successfully completed it. At the end of the training period, the technician receives a lump sum payment calculated at the rate of $3.50 per hour for the time spent in training.

[5] The technicians all work part time, and all of them are university level students.

The Employer submitted as exhibits the agreements it maintains with the five technicians. They uniformly require, *inter alia*, that the technician consult with the Employer on problems in his or her field of specialty, corneal excision. None of the agreements has a fixed expiration date, and all of them may be terminated by either party at any time by giving written notice to the other party. Payment is set either at the rate of $5 per hour of availability or $30 per case.[6] The amount of compensation included in each rate is fixed by Fuller.

The Employer contends that the technicians are independent contractors because they are specially trained and skilled individuals who set their own hours of availability, receive a flat fee for their work, are not supervised, and, except for the time they spend delivering corneal tissue or attending occasional meetings, are under no obligation to be present at the Eye Bank's facilities. That they are not covered by worker's compensation insurance, the Employer further contends, is another factor which supports its contention that they are independent contractors, as is the fact that they receive no fringe benefits and have no income tax or social security deducted from the moneys paid them.

In *The Beacon Journal Publishing Company*,[7] the Board set forth the following test to determine whether an individual is an independent contractor:

> In determining the status of persons alleged to be independent contractors, the Board applies a "right of control" test, which turns essentially on whether the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, or whether he controls *only* the result. In the latter situation, the status is that of an independent contractor. The resolution of this question depends on the facts in each case. No one factor is determinative.

Typically, in reviewing the evidence in a case of this kind, certain factors will tend to point to an independent contractor relationship and others to an employee relationship. This case is no different. However, from our reading of the record, we are convinced that the evidence which is indicative of employee status far outweighs that which supports the conclusion that the technicians are independent contractors.

The result which the Eye Bank pays the technicians to accomplish is the excision of human corne-

[6] Technician Temperly's contract provides compensation at the rate of $30 per case. Fuller stated that the agreements offered into evidence were current, but Temperly testified that she is presently receiving $5 per hour plus $10 for each usable cornea pursuant to a new contract.

[7] 188 NLRB 218, 220 (1971).

al tissue. In reaching this result, it is significant that the technicians "bear slight resemblance to the independent businessmen whose earnings are controlled by self-determined policies, personal investment and expenditures, securing business, and market conditions."[8] Among the factors belying the notion that the technicians are independent entrepreneurs are the following. Unlike businessmen, the technicians receive all of their training directly from, and provide their services exclusively to, the Employer with whom they are allegedly contracting.[9] While learning the requisite skills to perform a corneal excision, the Employer pays the technician in training a "flat fee" based on an hourly rate. Afterwards, those candidates who successfully complete the training period are offered form contracts of open duration, terminable by either of the parties at will. As technicians, they receive a flat fee for their services instead of wages, but the Employer unilaterally sets the rate at which they are to be compensated. Indeed, the only arms'-length dealing that occurs between the parties appears to be limited to whether the individual technician will be paid by the hour, by the case, or by some combination thereof. Further, in addition to paying the technicians for removing corneal tissue, the area of their special expertise, the Employer pays them for attending weekly meetings where it monitors their work. It also supplies them with all of the tools of their "trade," surgical instruments and disposable supplies. As to their work schedules, the technicians coordinate them among themselves, while the Employer retains final authority to settle any conflicts which may arise. All of the above factors are strong indicia of an employee, rather than an independent contractor, relationship.

In arguing that the technicians are independent contractors, the Employer places a great deal of emphasis on the fact that they perform their work without supervision. While the Employer may not exercise control over the technicians on a strict, day-to-day basis, the Employer's contention in this regard is misleading because it fails to take into account the nature of the technicians' work. In *Mitchell Bros. Truck Lines*,[10] the Board examined the question of limited supervision in determining the status of owner-operator truckdrivers and made the following observation:

> [I]n evaluating the extent of daily supervision we naturally have considered the nature of the occupation. Because the drivers are constantly on the road, Mitchell Bros. cannot supervise them on the basis of personal observation. Indeed, in this respect the drivers are similar to the insurance agents in *United Insurance* [*Company*, 390 U.S. 254, 258 (1968)], who were out of the office making business calls. And, the Eighth Circuit observed, in finding that nonowner cab drivers were "employees" under the Federal Insurance Contribution Act, "where the nature of a person's work requires little supervision, there is no need for actual control."[31] Accordingly the drivers' freedom here from daily observance does not necessarily free them from real supervision.

[31] *Air Terminal Cab, Inc. v. U.S.*, 478 F.2d 575, 580 (1973), cert. denied 414 U.S. 404.

In the instant case, after the technician is thoroughly trained in the corneal excision procedure, the work becomes fairly routine. The technician keeps in contact with the morgues and, when there is an excision to be performed, does so. On a day-to-day basis, the nature of the technicians' work is such that it requires little, if any, supervision.[11] The Employer does, however, effectively oversee the technicians' work through the weekly monitoring meetings, which it requires them to attend. According to Fuller, these meetings provide "the opportunity for the Eye Bank to try and understand the kinds of problems that they are having on the job . . . . And, hopefully improve performance, if that's a problem or technique or what have you [sic]."

In deciding that the technicians are employees, we also find it persuasive that they are involved in work which is virtually indistinguishable from that of the Employer. As the Board observed in *Mitchell Bros.*, "Indeed, their work is not merely 'part of the regular business of the employer,' it *is* the business of the Employer." Here, the technicians depend entirely on the Eye Bank for work, and the Eye Bank in turn depends on the technicians to secure the raw materials it needs to function as a supplier of corneal tissue. In the circumstances here, this interdependence militates convincingly against the contention that the technicians are independent contractors.[12] Accordingly, based on the foregoing, and the record as a whole, we find that the technicians are employees within the meaning of Section 2(3) of the Act.

Having concluded that the technicians are employees, we are faced with the question of whether

[8] See *The News-Journal Company*, 227 NLRB 568, 570 (1976).

[9] There is nothing in the record which indicates that the technicians work for any institution other than the Michigan Eye Bank. Rather, the record evidence points to the conclusion that the Eye Bank alone utilizes the technicians' highly specialized services.

[10] 249 NLRB 476, 481 (1980).

[11] The record shows that the technicians are under instructions to contact Tonia Victor, the assistant director of the Eye Bank, should any problems arise, such as inability to get to the morgue.

[12] See *Mitchell Bros. Truck Lines*, 249 NLRB at 482.

they are employed solely by the Michigan Eye Bank or, due to certain aspects of the working relationship between the Eye Bank and Wayne State University, are jointly employed by the two concerns, the latter of which is an exempt employer under the Act.

The Eye Bank hires, trains, and pays the technicians. Their compensation is fixed by Fuller, who is the Eye Bank's director and an employee of the University of Michigan, not an agent or employee of Wayne State University. They are paid directly by the Eye Bank, from the Eye Bank's own accounts, rather than indirectly from funds granted to the University. While virtually all of the technicians began their relationship with the Eye Bank as Wayne State University student assistants, nothing in the record indicates that the University retains any vestige of control over their wages, hours, and other terms and conditions of employment.[13] Therefore, we conclude that the technicians are employees of the Michigan Eye Bank alone and, therefore, that jurisdiction over the Employer, as to them, lies with the Board.

Accordingly, we find that the following employees constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time technical employees employed at the Employer's Wayne State University division, but excluding all office clerical employees, guards, and supervisors as defined in the Act.

[Direction of Election[14] omitted from publication.]

CHAIRMAN VAN DE WATER, dissenting in part:

Contrary to my colleagues, I would decline to assert jurisdiction over the Employer in this case, and would dismiss the petition.[15] In *Ming Quong Children's Center*, 210 NLRB 899 (1974), the Board reexamined and reaffirmed its longstanding policy of exercising its discretionary authority under Section 14(c)(1) to decline jurisdiction over various types of private, nonprofit, noncommercial institutions. In so doing, the Board reviewed its precedents and the legislative history of the Act relating to the exercise of jurisdiction over nonprofit employers and concluded that it would not effectuate the policies of the Act to modify its policy in this area. Subsequently, in *The Rhode Island Catholic Orphan Asylum, a/k/a St. Aloysius Home*, 224 NLRB 1344 (1976), the Board decided to abandon the wisdom of earlier years and announced that it would assert jurisdiction over nonprofit institutions.

I agree with the dissenters in *St. Aloysius*, former Chairman Murphy and former Member Penello, that it is inimical to the expressed will of Congress for the Board to assert its jurisdiction over the entire range of nonprofit entities without first examining in each case whether there are "exceptional circumstances" warranting their inclusion.[16] I also concur with their view that the policy the Board previously followed, as set forth in *Cornell University*[17] and *Ming Quong*, and summarized below, is the appropriate one to apply in this type of case:

> If a thorough reevaluation of the effect on commerce of a certain category of nonprofit employers reveals that it is exerting such a massive influence that it no longer comports with Congress' original intent that it remain outside the Board's jurisdiction, the Board would assert over that class. Jurisdiction would be asserted over any particular institution within such a class if that employer's activities have a "substantial" impact on commerce.[18]

Here, the Employer is a private, nonprofit corporation operating under a charitable trust license and governed by a volunteer board of directors. Its first purpose is to secure human corneal tissue for the purpose of transplantation. In addition, it conducts a public education program regarding the Michigan Eye Bank, maintains a donor pledge system for the living to pledge their eyes upon death, and supports and encourages eye research. The record shows that the Michigan Eye Bank had total income of approximately $369,000 for the fiscal year ending June 30, 1981, and that approximately $125,000 of this income was derived from services to concerns outside the State. There is no evidence concerning the effect on interstate commerce of the Michigan Eye Bank and other operations like it. Thus, the record does not demonstrate the "massive" impact on commerce required under *Cornell* and *Ming Quong* to assert jurisdiction

[13] As student assistants, the technicians were precluded by Wayne State University from working more than 20 hours per week for the Eye Bank. Thus, to increase the number of hours they could work, the Employer executed "consulting agreements" with them to cover the additional hours. Ultimately, the Employer decided to alter their status from student assistant/consultant to consultant. This evolution, we find, is further evidence that the Employer's attempt to maintain these individuals as independent contractors has more to do with bookkeeping convenience than the true nature of the relationship between them.

[14] [*Excelsior* footnote omitted from publication.]

[15] I agree with the majority that the petition should also be dismissed with respect to the research assistants on statutory grounds, because it would be impossible for the Eye Bank and the Petitioner to engage in meaningful collective bargaining without significantly involving Wayne State University, an exempt employer under Sec. 2(2) of the Act.

[16] See *Cornell University*, 183 NLRB 329 (1970).

[17] *Id.*

[18] 224 NLRB at 1347.

generally over this category of nonprofit organization.

As the record fails to disclose any basis for asserting jurisdiction over the Employer pursuant to the criteria set forth in *Cornell* and *Ming Quong*, I must respectfully dissent from my colleagues' decision to assert jurisdiction herein.